STATE OF MICHIGAN

COURT OF APPEALS

RONALD L. WINANS and DANETTE L. WINANS,

Plaintiffs-Appellees,

v

PAUL AND MARLENE, INC., d/b/a GRAND VALUE HOMES,

Defendant/Third-Party Plaintiff-Appellant,

and

SHOAL EXCAVATING,

Third-Party Defendant-Appellee.

UNPUBLISHED
July 8, 2003

No. 230944
Shiawassee Circuit Court
LC No. 98-002500-CH

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant Grand Value Homes appeals from a judgment of the circuit court entered following a jury verdict in favor of plaintiffs on their breach of contract and Michigan Consumer Protection Act, MCL 445.901, claims.[1] We affirm in part, reverse in part and remand.

In September 1997, plaintiffs purchased a parcel of property upon which to build a home. Before receiving the deed to the property, they entered into a contract with Grand Value for the purchase of a modular home to be placed on the property. Grand Value is a licensed builder that sells manufactured homes.

Plaintiffs hired an employee of Grand Value, Eric Horoky, to prepare the housing site. Horoky hired a subcontractor, defendant Shoal Excavating, to do the excavation necessary for the placement of the home on the lot. Plaintiffs informed Horoky that they wished to have a

[1] Defendant raises no issue on appeal regarding the breach of contract claim.

walkout basement in their new home and chose a location near the rear of the property. Before excavation began, there was a meeting between plaintiffs, Horoky, Ronald Shoal of Shoal Excavating, a member of the health department and another excavator regarding whether the home should be placed in the location selected by plaintiffs. Ultimately, the location was changed and Horoky testified that everyone involved agreed to the location.

Thereafter, Shoal excavated the basement for the house according to a hand-drawn plan provided by Grand Value, following stakes laid out by either Grand Value or plaintiffs. Shoal had no further involvement with the project. Thereafter, the building inspector approved the inspections of the foundation footings and the backfill.

Grand Value then constructed the home on the site and plaintiffs moved in during December 1997. On February 16, 1998, plaintiffs experienced severe flooding in the basement after a heavy rainfall the previous night. Plaintiffs contacted a number of people regarding the problem, including Horoky. Horoky suggested that they place gutters on the house, but refused to repair the condition or offer any other help. Plaintiffs consulted with a professional engineer, who testified that the location of the house was not suitable for a basement of any kind. Throughout the late winter and spring of 1998 the floodwater was eighteen inches high on the outside of plaintiffs' basement walkout door.

The current litigation ensued. Although plaintiffs originally brought additional claims, at trial they agreed to dismiss all counts except for the breach of contract claim and the consumer protection act claim. As noted above, the jury found in plaintiffs' favor on both counts.

Defendant first argues that the trial court erred in denying its motion for directed verdict on the consumer protection act claim because, as a licensed contractor, it is exempt from the consumer protection act under the Supreme Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). We agree.

In *Smith*, the Supreme Court addressed the question whether the defendant, an insurance company, was subject to the Michigan Consumer Protection Act concerning the manner in which it represented a policy for credit life and disability insurance. Specifically at issue was the provision of MCL 445.904(1) that exempts from coverage under the MCPA a "transaction or conduct specifically authorized under laws administered by a regulatory board . . . ." The Court in *Smith* also considered the effect of its prior opinion in *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), wherein the Court had held that a real estate broker was not exempt under the statute where the real estate broker was engaged in writing mortgages. In reaching its decision, *Smith, supra* at 464-465, opined as follows:

> In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is "specifically authorized." Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not "specifically authorized" under the defendant's real estate broker's license.
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> Applying this analysis in *Kekel* [*v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985)], the Court of Appeals concluded that the defendant insurer in

that case was exempted from the plaintiff's alleged violations of the MCPA pursuant to MCL 445.903; MSA 19.418(3). It explained:

> "*Diamond* is distinguishable from the case at bar. The activities of the defendant in *Diamond* which the plaintiffs there were complaining of were not subject to any regulation under the real estate broker's license of the defendant and thus such conduct was not reviewable by the applicable licensing or regulatory authority. . . . The insurance industry is under the authority of the State Commissioner of Insurance and subject to the extensive statutory and regulatory scheme, all administered "by a regulatory board or officer acting under statutory authority of this state." [*Id.* at 384, citing MCL 445.904(1)(a); MSA 19.418(4)(1)(a).]"

> Consistent with these rulings, we conclude here that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by the law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

Plaintiffs argue that a defendant is not exempt from the applicability of the MCPA merely because it is regulated by the state. Plaintiff is correct in that assertion, which is effectively what *Diamond Mortgage* holds. In *Diamond Mortgage*, the defendant was subject to state regulation as a real estate broker, but the activity involved, writing real estate mortgages, was not the type of activity regulated by the state under real estate broker licensing. In *Smith*, the activity involved, writing credit life and disability policies, was specifically regulated under the insurance code.

Thus the question in the case at bar is whether the activity involved comes within the scope of the residential builder licensing scheme. Defendant identifies the activity as being the construction of a residential house, an activity clearly covered by the residential builder section of the Occupational Code. See MCL 339.2401 *et seq.* Not surprisingly, plaintiffs' brief identifies a much narrower activity as being involved, namely "advising Appellees as to the location of the house on the lot that they had purchased, making decisions regarding wetlands, or misleading the Appellees as to what their role and relationship was." This differs somewhat from what plaintiffs identified as the MCPA violations in their complaint, which alleged as follows:

> 45. As a result of the failure to repair the property, the Defendant has acted in such a manner as to cause a probability of confusion or misunderstanding of the legal rights and obligations of the Plaintiffs in violation of Michigan's Consumer Protection Act, MCLA 445.901 et. seq.

> 46. The Defendant made deceptive representations about the quality and standard of the construction work performed on the residence and its premises, in violation of the Michigan Consumer Protection Act.

In any event, we believe that plaintiffs take an unreasonably narrow view of the scope of the transaction or conduct involved in determining whether this case falls within the holding in *Diamond Mortgage* or within the holding of *Smith*. We think that *Smith* makes it clear that we look to the general transaction involved, not the specific action which plaintiff alleges violates the MCPA. Here, the general transaction was the construction of a residence on plaintiffs' lot, which is regulated. That is to say, while the actions in *Diamond Mortgage* of writing mortgages was not the type of activity for which one needs a real estate broker's license, the actions in the case are bar are those of someone who needs a residential builder's license.

We also find helpful the comments of Justice Corrigan in her concurrence to the denial of leave to appeal in *Forton v Laszar*, 463 Mich 969, 970; 622 NW2d 61 (2001):

> Subsection 4(1)(a) of the MCPA provides that the MCPA "does not apply" to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Defendant now contends that his sale to plaintiffs comes within this exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* Of particular importance, argues defendant, is article 24 of the Occupational Code, which prohibits residential builders from departing from plans without consent. See MCL 339.2411(2)(d); MSA 18.425(2411)(2)(d). In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) of the MCPA referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board.

Justice Corrigan joined in the denial of leave, however, because the defendant had failed to properly preserve the issue for review.

For the above reasons, we are persuaded that defendant has established its right to the exemption and, therefore, the trial court did err in failing to dismiss the claim under the MCPA.

Defendant's second issue on appeal is that the trial court erred in granting third-party defendant's motion for directed verdict on defendant's third-party claim. We disagree. We review this issue by looking at the evidence in a light most favorable to the non-moving party to determine whether a factual question exists. *Oakland Hills Development Corp v Leuders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1994). In the case at bar, the trial court

concluded that Shoal excavated the basement in the location directed and no evidence pointed to Shoal being at fault for the problems with the flooding of the basement.

Plaintiffs' expert testified that the location of the house was not suitable for a basement of any kind. Shoal was not involved in the decision where the house was located. Shoal was merely directed to excavate the area that had been staked out. Furthermore, defendant did not introduce any evidence that the excavation work was defective. At most, defendant was able to show that changing the grading of the ground was part of the correction of the problem, but not that Shoal had any reason to believe that the initial grading was improper at the time of the excavation.[2]

For the above reasons, we are not persuaded that the trial court erred in granting third-party defendant's motion for directed verdict.

Affirmed in part and reversed in part and remanded for entry of an amended judgment dismissing the MCPA claim consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Pat M. Donofrio

[2] Defendant argues that the building inspector testified that the grading was improper. In fact, the referenced testimony of the building inspector was merely that the grading had changed after his initial inspection. Furthermore, plaintiff's expert testified that while the person who determined the level of the basement contributed to the flooding problem, his opinion would change if the excavator had not encountered ground water or indications of ground water during the excavation. There is no indication that such problems were observed during the excavation.